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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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No. 626

GROVER L. DERRICK, ET AL.,
Petitioners

versus

THE CITY COUNCIL OF AUGUSTA, ET AL.,
Respondents

Petition for Writ of Certiorari to The United States
Circuit Court of Appeals for the Fifth Circuit.

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Vs.

THE CITY COUNCIL
OF AUGUSTA, ET AL.,

Respondents.

PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH
CIRCUIT.

TO THE HONORABLE, THE SUPREME COURT OF THE
UNITED STATES:

The petition of Grover L. Derrick, Carl Lee Mitchell, Haskell A. Lowe, M. Luther Coon, Harry H. Lowe, Dantzler E. Eargle, Ossie W. Cochran, Luther F. Johnson, W. L. Attawary, Michael D. Kaney, Hugo W. Addie, Morris L. Warren, Walter D. Lowe, Mrs. Evie Glaze, Dallas W. Addie, Mrs. Magdalene Patterson, Ralph D. Greene, Otis C. Wood, Harry A. Parker, J. W. Richardson and Elbert J. Puckett, respectfully shows:

That on January 7, 1941, The City Council of Augusta adopted Ordinance Number 1357, the caption of which is as follows:

"An Ordinance defining and regulating taxi cabs, dime taxicabs, jitneys, and similar types of transportation operating within points of the City of Augusta, or from points without the City of Augusta to points within the City of Augusta, and from points within the City of Augusta, to

points without the City of Augusta; to require them to have a fixed place of business, telephone and person in attendance; to prohibit the cruising of such taxicabs and solicitation of business by them; to provide for licenses to be paid by such operators; to regulate the number of passengers that may be hauled by such vehicles; to provide for the giving of bond or filing of policy of indemnity insurance with the proper officer of the City of Augusta; to provide the streets upon which such persons may operate; to provide for penalties for violation of this ordinance; to repeal conflicting ordinances; and for other purposes." (R. 9).

In January 1941 H. A. Lowe and others (including some of the petitioners herein) filed their bill in equity in the United States District Court for the Southern District of Georgia, Augusta Division, seeking to enjoin the enforcement of Ordinance 1357 upon numerous grounds set out in that petition. The case came on to be heard before the Honorable William H. Barrett, then Judge of that District Court, and pending his decision thereon the Ordinance was amended in February 1942 by repealing the Sections requiring a license, imposing a tax and exacting a bond, and also changing some of the streets upon which the automobiles might operate. (R. 32).

Pending the decision of the Lowe case in the District Court Judge William H. Barrett died, and in due course the case came on to be heard before the Honorable Archibald B. Lovett, District Judge, and he rendered an opinion therein on April 27, 1942. (R. 69). 45 Fed. Sup. 145.

After the decision in the Lowe case The City Council of Augusta on July 8, 1942, again materially amended Ordinance 1357. Prior to this amendment Section 5 of the Ordinance, restricting the use of Broad Street in the City of Augusta except in a one block zigzag fashion, had applied only to the licensees under the Ordinance, that is persons holding licenses from The City Council of Augusta. By this amendment the Ordinance was broadened to cover not only the licensees of The City of Augusta, but also all other persons operating any of the vehicles

described in the Ordinance, including those holding licenses from the Georgia Public Service Commission and persons engaged in Interstate Commerce. (R. 13).

On August 25, 1942, petitioners herein filed their bill in equity in the United States District Court for the Southern District of Georgia, Augusta Division, seeking to enjoin the enforcement of Ordinance Number 1357 as amended by amendments approved February 3, 1942, and July 8, 1942. (R. 1).

The case came on to be heard before the Honorable Archibald B. Lovett on August 9, 1942, and it was stipulated between counsel and approved by the Court that the testimony in the case of *Lowe vs. The City Council of Augusta* should be considered as evidence in this case. (R. 35). Certain oral testimony was introduced, and on September 21, 1942, the Court refused to grant the injunction prayed for and dissolved the temporary restraining order. (R. 53). Whereupon, an appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the judgment of the lower Court on October 20, 1943. The opinion of the Circuit Court of Appeals referred to and adopted the opinion of the District Court in the *Lowe* case "as a correct statement of the facts and of the principles controlling here". (R. 159). A petition for rehearing was filed and denied December 3, 1943. (R. 172).

There is filed herewith a certified copy of the entire record in the lower Court, including the decision of the Circuit Court of Appeals, the motion for rehearing and all other proceedings therein.

The question presented by this case is whether or not a municipal corporation under the guise of police regulations shall be permitted to burden, fetter and even destroy the business of interstate motor carriers. It is respectfully urged that this case present a question of grave public importance and concern, for the reason that the principles involved directly affect the right of interstate carriers for hire to use the streets of municipalities through which they pass unhampered and unfettered by regu-

lations purporting to be a reasonable exercise of the police power, but actually intended to destroy the business of the interstate carrier.

The statutory provision which sustains this petition is 28 U. S. C. A. 347.

The decision of the Circuit Court of Appeals is contrary to the rule laid down in *Erie Railroad Company vs. Tompkins*, 304 U. S. 64; 82 L. Ed. 1188; and *Meredith vs. City of Winterhaven*, 88 L. Ed. Page 1, in which this Court held that Federal Courts were required to follow State laws and State decisions.

The decision is in conflict with Sections 68-601 and 68-603 of the Civil Code of Georgia for 1933, the same being codifications of the Georgia Motor Common Carriers Act of 1931 under which regulation of the business of any person engaged in the transportation as a common carrier of persons or property, either or both, for hire by motor vehicles on any highway of the State of Georgia is vested in the Public Service Commission of the State of Georgia.

The decision is in conflict with the Motor Common Carrier Act of the State of Georgia as construed by the Supreme Court of Georgia in *City of Albany vs. Ader*, 176 Ga. 391; 168 S. E. 1, in which the Supreme Court of Georgia said:

"The Ordinance of the City of Albany which is attacked in the plaintiff's petition as illegal and void because in conflict with a part of Section 18 of the Motor Common Carrier Act approved August 27, 1931 (Georgia Laws 1931, page 199, et seq.), the Ordinance referred to being entitled 'An Ordinance to provide for the regulation of motor carriers operating in and through the City of Albany, Georgia; the routing of said motor carriers; the levying of a street tax on such motor carriers, for the purpose of maintenance, repairing and upkeep of the streets of the City of Albany; to provide a penalty for the violation of this Ordinance; and for

other purposes,' invalid because repugnant to the statute just referred to, upon the grounds taken in the petition",

The decision of the lower Court is also in conflict with the law of Georgia as construed by the Supreme Court of Georgia in the case of Mayor & Aldermen of the City of Savannah vs. Ellington Company, 177 Ga. 149; 170 S. E. 38, in which case the Supreme Court of Georgia construed the State Motor Common Carrier Act as follows:

"The control of the State over the streets and highways of the entire commonwealth is paramount and supreme. Municipal ordinances which conflict with legislative enactments must yield to the superior authority of the State. Silence on the part of the State, while the State may concede for the time being to municipalities the control and regulation of the streets and highways within the corporate limits of a municipality, is no bar to the exercise of the supreme authority whenever the State sees fit, by legislative enactment, to exercise authority and control".

"Under the principle announced in the foregoing headnote the municipal ordinance of the City of Savannah, approved January 13, 1932, entitled 'An ordinance to provide for the registration of motor carriers operating in and through the City of Savannah; the routing of said motor carriers; the levying of a street tax on such motor carriers, for the purpose of maintenance, repair, and upkeep of the streets of the City of Savannah; to provide a penalty for the violation of this ordinance; and for other purposes', is invalid and void".

Petitioners are operating in conformity with 49 U. S. C. A. 304, and are interstate carriers entirely, doing no intrastate business in the State of Georgia (R. 74 and 75). Section 5 of Ordinance Number 1357 prohibits the use of Broad Street in the City of Augusta, the same being the business street of that City, to these interstate carriers except in one block stages (R. 11), the effect of compliance therewith being that in order to pick

up and deliver passengers on Broad Street petitioners would have to pursue a circuitous or zigzag route, circulating back and forth between Broad Street and its parallel streets, with resultant delay and additional expense of operation, which would have the effect of burdening, fettering and ultimately destroying petitioners' business as interstate carriers. From a traffic control viewpoint the witnesses sworn for the City as traffic experts testified without exception that such a procedure would impede traffic and create traffic congestion, and would not have the result of remedying any traffic congestion which might now exist. (R. 121 and 122; 123 and 128; 128, 130 and 132).

It is respectfully urged that with these facts definitely established, the Court should have found that the true intention and purpose of Ordinance Number 1357 was not a bona fide effort to regulate traffic, but an ingenious scheme to destroy petitioners' business as interstate carriers under the guise of traffic regulation.

It is respectfully submitted that in not so holding, the trial Court and the Circuit Court of Appeals reached conclusions in conflict with the decision of this Court in the case of *Best & Company, Inc. vs. A. J. Maxwell, Commissioner, etc.* 311 U. S. 454; 85 L. Ed. 275, in which Mr. Justice Reid in delivering the opinion of this Court said in part:

"The Commerce Clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce".

The decision in the instant case is in conflict with the decisions of this Court in the case of *Buck vs. Kuykendall*, 267 U. S. 307; *Bush Co. vs. Maloy*, 267 U. S. 317; *Adams Express Co. vs. New York*, 232 U. S. 14; *Crutcher vs. Kentucky*, 141 U. S. 47.

Section 2 of the Ordinance before the Court requires that each

petitioner maintain an office, a telephone and an attendant on duty at all times within the City of Augusta. The undisputed evidence established that to comply with this Section would cost each petitioner over \$150.00 a month (R. 88). This would be confiscatory of the business of each petitioner. In discussing this section, the trial Court in the Lowe case said:

"It may be conceded that appropriate local regulations adopted primarily to promote safety upon the streets of a municipality are not obnoxious to the Commerce Clause of the Constitution of the United States, where the indirect burden upon interstate commerce is not unreasonable. Looked at as a regulation of traffic only, it is not easy to understand why an office, attendant and telephone will make traffic conditions safer. The means are not adapted to the end sought. The legislative choice of means seems without rational basis. Such facilities would tend to increase rather than diminish both the number of cabs in operation and the frequency of their use of the streets. See South Carolina Highway Dept. vs. Barnwell Bros., 303 U. S. 177, 190. The small number of cabs relative to the whole number using the streets suggests there must be some other purpose behind the legislation. Whatever the purpose, as applied to the facts in this case, many of the provisions of the ordinance that remain after the amended constitute a regulation, not of the use of the city's streets, but of interstate commerce. The regulation to the extent stated not only obstructs interstate commerce—it abolishes it. Such action is forbidden by the Commerce Clause. Buck vs. Kuykendall, 267 U. S. 307; Bush Co. vs. Maloy, 267 U. S. 317; Adams Express Co. vs. New York, 232 U. S. 14; Crutcher vs. Kentucky, 141 U. S. 47."

Although the trial court in the Lowe case thus held Section 2 of the Ordinance to be in conflict with the Commerce Clause and with the decisions of this Court above referred to, and although the Circuit Court of Appeals adopted and approved this decision of the trial court in the Lowe case as its decision

in the instant case (R. 161), nevertheless, the trial Court in the instant case refused to enjoin Section 2 of the Ordinance, which is in full force and effect (R. 53), and this decision of the trial court was affirmed by the Circuit of Appeals (R. 159-161). The result of this is to leave Section 2 of the Ordinance in full force and effect, although the same is in conflict with the decisions of this Court above cited, is in conflict with the Commerce Clause of the Constitution and has been so held by the trial court in the Lowe case in its decision which was adopted by the Circuit Court of Appeals in the instant case.

The decision of the trial court was based in part upon the proposition that the issues presented in this case are *res judicata*. It is respectfully urged that in so holding the trial court inadvertently failed to consider the fact that Ordinance Number 1357, upon the date it was construed in the Lowe case, was by its terms applicable only to licensees under the City Council of Augusta and did not apply to persons holding licenses from the Georgia Public Service Commission (R. 11). It was not made applicable to other persons than licensees of the City Council of Augusta until July 8, 1942, upon which date it was amended to make it so applicable (R. 13), the decision in the Lowe case having been filed on April 27, 1942.

The Ordinance construed in the Lowe case, therefore, was materially different from the Ordinance construed in the instant case. Petitioners in the instant case are all licensees of the Georgia Public Service Commission, and none of them are licensees of the City Council of Augusta (R. 36).

The decision of the trial court affirmed by the Circuit Court of Appeals is also based in part upon the proposition that the Ordinance is separable (R. 66). In holding that the Ordinance is separable the decision is contrary to and in conflict with the decision of the Supreme Court of Georgia in the case of *Ellington Co. vs. City of Macon*, 177 Ga. 541; 170 S. E. 813, where the Court held, that where a portion of an almost identical ordinance relating to common carriers is invalid because repugnant to the state law, the entire ordinance will necessarily fail, since the

objectionable portion as to common carriers is so connected with the general legislative scheme that if it should be stricken out, effect could not be given to the intention of the Mayor and Council in adopting the ordinance.

What was said in that case by the Supreme Court of Georgia is even more true in the instant case. The Ordinance as originally passed contained the following provisions (R. 9):

Sec. 2. Required an office, telephone service and an agent in charge at all times.

Sec. 3. Limited loads to six passengers.

Sec. 4. Prohibits cruising or soliciting passengers.

Sec. 5. Prohibits use of Broad Street except in one block stages.

Sec. 6. Called for strict compliance with all traffic ordinances.

Sec. 7. Provided for a license and a license fee.

Sec. 8. Provided for giving of an indemnity bond.

It is respectfully suggested to the Court that there is no doubt that the Ordinance as originally passed would have accomplished its true purpose of completely eliminating appellants from interstate commerce and from competition with competing carriers, and the trial Court stated in its opinion in the Lowe case that the Ordinance would have destroyed the business of appellants as Interstate Carriers. (Record, pages 76 and 77).

Subsequently, while the Lowe case was pending and after the same had been heard before the honorable William H. Barrett, then Judge of the District Court, the Ordinance was amended on February 2, 1942, and Sections 7 and 8 were repealed in their entirety (Record, Pages 32 and 33).

The evidence shows that the provisions of Sections 3, 4 and 6

were already covered by earlier existing Ordinances still unrepealed and were, therefore, entirely redundant in this Ordinance (Record, page 123).

Eliminating the provisions which have been repealed and those that are redundant leaves actually effective only Section 2, providing for an office, telephone add attendant, and Section 5 restricting the use of Broad Street to one block stages.

The trial Court in the Lowe case held Section 2 violative of the interstate Commerce Clause, and it is respectfully suggested that the trial Court should have so held in the instant case, and that this Court should now so hold.

This would leave out of the entire elaborate Ordinance only Provision 5, which restricts the use of Broad Street except in one block stages, and as to this provision three of appellees' witnesses, sworn by them as experts on traffic control, testified that the result of its enforcement would be to increase traffic congestion rather than to remedy any traffic congestion that might exist.

It is respectfully suggested to this Court that the trial Judge, in view of the foregoing, should have drawn the conclusion that the entire Ordinance under attack was passed, not in a bona fide effort to control traffic, but there must have been other purposes behind this legislation as charged by appellants, as, indeed, the trial Judge did find in respect to Section 2 above (Record, pages 76 and 77).

WHEREFORE, petitioners pray the grant of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and that the judgment of that Court be reversed.

Respectfully submitted,

Attorney for Petitioners

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The facts in the foregoing petition are true to the best of my knowledge and belief; and in my opinion, the assignments of error are meritorious and present questions of such public concern, and of gravity and importance, as would warrant the issuance of a Writ of Certiorari.

This _____ day of January, 1944.

Attorney for Petitioners

Augusta, Georgia.

We hereby acknowledge due and legal service of the above and foregoing petition for Writ of Certiorari.

This _____ day of January, 1944.

Attorneys for The City Council of Augusta.

**END OF
A CASE**